appeals should have considered *only* Kristof's various cautionary statements, and not the meaning of the articles as a whole.

But that position is directly contrary to the law as articulated by The Times itself. Kristof's admonitions are not irrelevant, but the columns *must* be viewed "as a whole." The Fourth Circuit reasonably found that the "unmistakable theme" of Kristof's columns was that all the evidence suggested that Dr. Hatfill murdered five innocent people. Against that backdrop, the court correctly concluded that just as "a defendant cannot escape liability for making a false assertion of fact by prefacing that assertion with 'in my opinion,'" neither "can it escape liability by simply pairing a charge of wrongdoing" with cautionary statements such as that the subject must "be presumed innocent." Pet. 22a-23a.

Properly understood, then, this case does not even present The Times's first "Question Presented." Again, that question seeks review by this Court to insure that defamation cases will survive motions to dismiss only if the statements at issue may be "reasonably" understood to convey a defamatory meaning when "taken as a whole." Here, however, the parties and the court below all agree on that rule—The Times simply disagrees with the lower court's application of it to the facts of this case.

Finally, it bears note that the rule in question here is one of *state* law. Indeed, the Fourth Circuit's discussion of the Virginia standard for defamation and its application to this case spans no fewer than nine pages of the petition's appendix. Pet. 15a-23a. That is, moreover, the standard that

The Times itself presented to the Fourth Circuit.[2] The Times did *not* argue in the court of appeals that the First Amendment requires the application of a *different* standard than that contained in Virginia law. Accordingly, the court of appeals applied the legal standard proposed by The Times, and The Times merely disagrees with the court's application of that state-law standard.

II. PETITIONER'S SECOND "QUESTION PRESENTED" INVOLVES ONLY FACT-SPECIFIC APPLICATION OF SETTLED LAW.

Petitioner's second "Question Presented" exhibits essentially the same flaws as its first. Although its argument is difficult to follow, The Times appears to maintain that the Fourth Circuit ignored the "actual malice" requirement of *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). That is incorrect. Rather, the court of appeals applied that standard but, contrary to The Times's arguments, concluded that the complaint alleges an intentional infliction of emotional distress claim that satisfies Virginia law and federal constitutional requirements.

In *Falwell*, this Court held that public figures and public officials may not recover for the tort of intentional infliction of emotional distress without showing that a false statement was made "with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* Under Virginia law, as the Fourth Circuit explained, a plaintiff making a claim for intentional infliction of emotional distress must properly allege conduct on the part of defendant that was both "outrageous and

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[2] Appellee's Brief at 26-27 (citing *Wells v. Liddy*, 186 F.3d 505, 522 (4th Cir. 1999); *Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998)).

intolerable" and "intentional and reckless." Pet. 27a. Before the Fourth Circuit, The Times argued (primarily) that it had not acted outrageously and intolerably, Appellee's Brief at 44-47, and (secondarily) that it had not acted intentionally and recklessly, Appellee's Brief at 47-48. The Times did *not*, however, contend that the First Amendment requires *more* of a showing on the latter point than does Virginia law.

The Fourth Circuit properly rejected The Times's arguments. The court explained that Dr. Hatfill's complaint alleges that "The Times intentionally published false charges accusing him of being responsible for anthrax mailings that resulted in five deaths, without regard for the truth of those charges and without giving Hatfill an opportunity to respond." Pet. 28a. Those allegations—and specifically that "The Times intentionally published false charges . . . without regard to the truth of those charges"—fully satisfy the actual malice standard. Again, that standard requires proof that the defendant acted "with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Falwell*, 485 U.S. at 56.

The Times is therefore simply wrong to claim that the Fourth Circuit "has gone so far as to disregard the central tenet of *Falwell*." Pet. 24. In this case, Virginia law required Dr. Hatfill to allege (and will ultimately require that he show) that The Times acted with reckless disregard of the truth of its allegations. That is what this Court required in *Falwell*.[3]

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[3] Moreover, in *Falwell* this Court enunciated that standard with respect to intentional infliction of emotional distress claims brought by "public figures and public officials." 485 U.S. at 56. Dr. Hatfill was not a public official and he was not a public figure when The Times started publishing the articles at issue.

On pages 22-23 of its petition, The Times highlights a number of mostly district court cases, albeit without claiming that the decision below created any split with those cases that would justify review under this Court's certiorari standards. Indeed, it does not.

In discussing those cases, The Times first argues that "some courts" have held that a claim for intentional infliction of emotional distress is not available when it would simply "duplicate" a claim for libel. Pet. 22 (citing *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 510 (1st Cir. 2002), and *Chaiken v. VV Publ'g Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995), *aff'd*, 119 F.3d 1018 (2d Cir. 1997)). Petitioner neglects to mention, however, that the *Moss* court so held as a matter of *state* law. 312 F.3d at 510 ("New Hampshire law does not recognize a cause of action for wrongful infliction of emotional distress where the factual predicate sounds in defamation."). *Chaiken*, in contrast, held nothing of the sort—it merely recited the *Falwell* requirement of "actual malice" and interpreted it to necessitate a showing of "gross irresponsibility" to prevail on a claim of intentional infliction of emotional distress. There is plainly no conflict (nor even tension) between these holdings and the case below. Moreover, Dr. Hatfill expressly disclaimed duplicative damages. Appellant's Brief at 59.

The Times next points out that some courts require plaintiffs alleging intentional infliction of emotional distress to "plead and prove the added element that defendant published allegedly false facts specifically to cause harm to the plaintiff," while other courts do not. Pet. 23. The cases upon which petitioner relies, however, illustrate only the unsurprising fact that the elements of the common law tort of intentional infliction of emotional distress vary from state to state. *See, e.g., Lambert v. Garlo*, 484 N.E.2d, 260, 264 (Ohio Ct. App. 1985) (reciting different Ohio standards that,

in some circumstances, require showing that the publication is not a matter of legitimate public concern); *Levin v. McPhee*, 917 F. Supp. 230, 242 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 189 (2d Cir. 1997) (interpreting New York law to require the conduct allegedly causing the emotional distress to be "intentionally directed at the plaintiff without any reasonable justification"); *Bell v. The National Republican Congressional Committee*, 187 F. Supp. 2d 605, 618 (S.D. W. Va. 2002) (interpreting West Virginia law to require recklessness and outrageousness, but no "intentional direction" of emotional harm at plaintiff). Clearly, however, the undeniable fact that the common law of different states may contain different elements for the same tort does not remotely call for review by this Court.

The Times also asserts that a "body of cases" flatly holds that speech about matters of public concern can never be sufficiently outrageous to support a claim of intentional infliction of emotional distress. Pet. 23. The lone circuit case cited by petitioner, however, does not hold that at all. *See Ruffin-Steinback v. dePasse*, 267 F.3d 457, 465 (6th Cir. 2001) (upholding district court finding under Michigan law that the defendant's particular acts could not reasonably be considered outrageous and were not tortious in any sense); *see also Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 735 (E.D. Mich. 2000). And the lower court cases cited by petitioner only again underscore that different states have different law on intentional infliction of emotional distress. *See, e.g., Tackett v. KRIV-TV (Channel 26)*, 1994 WL 591637, at *2 (S.D. Tex. May 5, 1994) (indicating that Texas does not recognize the tort at all). As noted above, however, this Court has no place reviewing divergences among the states on matters of state law.

Finally, in the court of appeals, The Times also argued that Dr. Hatfill's intentional infliction of emotional distress

claim constituted an "end run" around the constitutional limitations on defamation claims. Appellee's Brief at 51-53. The court of appeals responded that there is likely no "end run" issue here at all because, in its view, Dr. Hatfill likely could not prevail on an intentional infliction of emotional distress claim if he could not prevail on a defamation claim. *See* Pet. 28a-29a. At any rate, the court found that at this stage of the proceeding—addressing a motion to dismiss under Rule 12(b)(6)—it need concern itself only with "whether Hatfill's allegations, taken as true, describe intentional and outrageous conduct." Pet. 29a.

Thus, contrary to The Times's claim, the Fourth Circuit did not conclude that there is "no First Amendment bar to liability" for intentional infliction of emotional distress even if the First Amendment bars liability for defamation. Pet. 24. All the court concluded is that Dr. Hatfill adequately alleged that The Times acted outrageously and intentionally, which is sufficient to satisfy *both* Virginia law and the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY

Petitioner,

- v.-

STEVEN J. HATFILL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner The New York Times Company respectfully submits this Reply Brief in support of its Petition for a Writ of Certiorari.

1. Respondent incorrectly argues that the decision below involves the simple application of an undisputed principle of state common law to the facts of this case. To the contrary, the question presented is whether the court below transgressed the boundary marked by the First Amendment in applying the common law. In this regard, the Fourth Circuit's broad view of libel claims that may be pursued based on the pleading of implied meaning contradicts and thereby undermines established First Amendment principles governing speech on matters of public concern.

First, the decision below permits claims for libel by implication arising from speech on matters of public concern to proceed if specific statements in a publication could, *in isolation*, give rise to a defamatory implication. But this Court's articulation of the protection afforded by the First Amendment to speech on matters of public concern has heretofore required judges to consider an allegedly defamatory statement in the context of the publication as a whole, and this constitutional principle should apply equally to allegedly defamatory implications. While the parties here agree that the law permits a cause of action for defamation to be based on an implication "reasonably conveyed" by a publication read "as a whole and in context," such a standard was neither articulated nor applied by the court of appeals in this case. Rather, the *only* standard the Fourth Circuit *said* it was applying is whether an alleged "'inference, implication or insinuation'" of plaintiff's guilt reasonably arises from "'allegedly defamatory words'" in the columns "'taken in their plain and natural meaning.'" App. 17a (citations omitted). Applying this standard, the Fourth Circuit considered only the specific factual statements alleged by Respondent to be false and, giving them "'every fair inference that may be drawn'" in his favor, concluded that "these assertions" could indeed imply that he had committed a crime. App. 17a, 21a, 23a (citations omitted). In so holding, the Fourth Circuit never acknowledged any judicial obligation to weigh such reported facts against the columns' express disavowals that they were accusing Respondent of guilt and, in determining whether the columns could reasonably be deemed to communicate an implied defamatory meaning, did not do so.

Respondent latches onto the court of appeals' reference to the meaning of four challenged columns "taken together," Resp. Br. at 3, 5, but this refers only to the fact that the

specific factual statements the Fourth Circuit found capable of conveying an implication of guilt were drawn from four different columns that "taken together" could imply that Respondent had committed a crime.[1] The opinion below makes plain that the panel majority did *not*, as Respondent infers, consider the disavowals and weigh the columns "as a whole." To the contrary, the opinion expressly rejects any such obligation, dismissing the disavowals as legally irrelevant.[2] Respondent is simply wrong in urging that the uncontested state law standard was applied, and has no answer to the conflict between the much more narrow standard used by the Fourth Circuit and the standard used by many other Courts of Appeals and state courts of last resort when addressing similar claims of libel by implication. *See* Pet. at 15-16 (citing cases).

Second, and more fundamentally, Respondent's claim that the Fourth Circuit simply applied a settled common law standard is beside the point. This Court has recognized that there is a constitutional boundary that limits the ability of state law to punish speech about matters of public concern. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

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[1] Respondent attempts to bolster the Fourth Circuit's conclusion by arguing that the columns did not criticize the FBI "for failing to investigate anyone *other* than Dr. Hatfill." Resp. Br. at 2 (emphasis in original). While the columns did not name any other scientist, they did refer to Respondent as one "example" of a "handful of people" who had the capability to pull off the mailings, App. 92a, and objected to the FBI's failures in investigating generally the "scientists at two suspect labs," App. 94a.

[2] *See* App. 22a (courts need not consider impact of express disclaimers any more than they must consider the words "'in my opinion'") (citation omitted). To the extent the panel majority recognizes any overall meaning of the columns as a whole, it is that their "unmistakable theme" calls for "the FBI [to] investigate Hatfill more vigorously." *Id.* This is hardly an accusation of guilt, particularly given the columns' express denial of any such accusation.

(application of common law "of and concerning" limitation to a claim for libel violates the First Amendment). Among other things, the First Amendment limits the methods by which a court determines whether a statement is susceptible to an actionable defamatory meaning. *See, e.g., Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970); *see* Pet. at 13-14. This case should be reviewed by this Court precisely because the Fourth Circuit crossed the constitutional boundary. It articulated the scope of the judicial inquiry with respect to defamatory meaning so strictly that—whether consistent with state law or not—it failed, as did the lower court in *Bresler*, to afford the level of protection the Constitution requires to speech about matters of public concern.

"The consequences . . . for the First Amendment" of requiring a publisher to defend an implication of guilt allegedly conveyed by criticisms of an important government investigation, as Judge Wilkinson explained below, "run deep." App. 73a. The contours of the constitutional protection afforded defendants facing claims of libel by implication have yet to be defined by this Court, and this case provides the appropriate vehicle to clarify the requirements of the First Amendment in this important area.

2. Respondent does not dispute that the lower courts have taken confused and vastly inconsistent approaches in their attempts to resolve the obvious constitutional tension created when tort claims for the intentional infliction of emotional distress are based solely on the publication of information about matters of public concern. *See* Pet. at 22-24. Rather, Respondent (1) discounts as involving "state law" cases such as *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 510 (1st Cir. 2002), that prohibit intentional

infliction claims when they duplicate a claim for libel,[3] (2) sidesteps cases requiring a specific intent to cause harm when emotional distress is allegedly the result of a publication,[4] and (3) shrugs off a wide body of case law in which courts have held that even false speech about matters of public concern was not "outrageous" within the meaning of this tort as a matter of law.[5] Resp. Br. at 11-12. According to Respondent, none of these cases create a "split" with the holding below. This observation, however, is beside the point. The fact remains that, unlike the decision below, all of these cases limit the reach of the intentional infliction

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[3] *See* Pet. at 22-23 (citing cases); *see also Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408 (C.D. Cal. 1987) (no claim for emotional distress based on defamation), *aff'd on other grounds*, 867 F.2d 1188 (9th Cir. 1989); *Barker v. Huang*, 610 A.2d 1341 (Del. 1992) (same); *Zazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993) (en banc) (same). The court in *Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995), *aff'd*, 119 F.3d 1018 (2d Cir. 1997), also rejected a duplicative claim for intentional infliction, but as Respondent notes, did so because the Complaint failed to allege the requisite fault.

[4] *See* Pet. at 23 (citing cases).

[5] *Id.*; *see also Ruffin-Steinback v. dePasse*, 267 F.3d 457, 465 (6th Cir. 2001); *Levin v. McPhee*, 917 F. Supp. 230, 242 (S.D.N.Y. 1996), *aff'd on other grounds*, 119 F.3d 189 (2d Cir. 1997); *Cook v. Winfrey*, 141 F.3d 322, 330-31 (7th Cir. 1998) (noting that many Illinois courts dismiss claims of intentional infliction based on defamation because the conduct is "not 'extreme and outrageous'"); *see generally Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993) ("publication – without more – could not ordinarily lead to liability for intentional infliction of emotional distress"). Respondent incorrectly describes *Tackett v. KRIV-TV* as holding that "Texas does not recognize the tort at all." Resp. Br. at 12. *Tackett* does reject any cause of action for *negligent* infliction of emotional distress, but does recognize the tort of *intentional* infliction. To protect speech, the court in *Tackett* prohibits claims for intentional infliction that are based on the publication of "potentially defamatory statements." *Tackett v. KRIV-TV*, Civ. A. No. H-93-3699, 1994 WL 951637, at *2 (S.D. Tex. May 5, 1994).

tort in a manner that avoids the constitutional conflict that would otherwise arise when its vague "outrageous" standard is applied to speech about public matters.

The Fourth Circuit's rejection of all of the limiting factors other courts have crafted in the absence of guidance from this Court underscores the very real conflict between its holding and the First Amendment. As Judge Wilkinson noted, "[t]he panel offers no decision from Virginia or any other state that holds a news report on a subject of unquestioned public interest to be an intentional infliction of emotional distress." App. 72a.

The Petition should be granted because the record in this case squarely frames the constitutional issue presented when the tort of intentional infliction of emotional distress is applied to a newsworthy publication, and this case provides an appropriate vehicle to resolve the existing confusion among the lower courts. The current diversity of approaches itself serves to inhibit speech about matters of public concern, a situation that will only be exacerbated if the Fourth Circuit's decision is permitted to stand.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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